# MR. TAFT AND THE SHERMAN ACT.

BY THOMAS THACHER.

In his speech before the Ohio Society, on December 16th, 1908, Mr. Taft announced his assent substantially to the following propositions: (1) The Sherman Act, the anti-trust act of 1890, should be amended; (2) it should not apply to railroads and other agencies of transportation, the regulation of which should be left to the Interstate Commerce Act and its amendments and supplements; (3) it should not make illegal every combination of capital and energies previously in competition in interstate or foreign trade or commerce; (4) the amendment should be effected, not by the use of the word "reasonable" or "unreasonable," or any other words of uncertain meaning, the work of giving a definite meaning being passed over to the Courts, but by the use of language so simple and clear as to enable business men to know from the reading of it what it forbids.*

And these two other propositions are implied in what he said: (5) A definite understanding of the evil or evils to be cured should precede the enactment of remedies; and (6) no remedy should be enacted which would do more harm than good.

All this is sane and sound—so obviously so that it seems strange at first thought that it should need to be authoritatively stated, or that the statement should give special satisfaction. But nothing is more often needed than the clear assertion of propositions which, when stated, are necessarily accepted, or of principles which may be forgotten, but which cannot be questioned.

(1) As to the first proposition, that the Act should be amended, there seems to be no difference of opinion. Even the labor-leaders and the Standard Oil Company are in accord upon it. All who think agree that there is something wrong with this law.

* I do not pretend to quote Mr. Taft *verbatim*, but state the substance of what he said as I understood him.

(2) Very few persons of intelligence will dissent from the second proposition, calling for the exclusion of railroads, although the most noted victories of the Government in enforcing this law have been in cases to which it would not have been applied if railroads had been originally excluded from the field of its operation. I refer, of course, to the Trans-Missouri case, the Joint Traffic case and the Northern Securities case. The arguments and opinions in the first two of these cases, while they failed to convince the Supreme Court that the Act did not apply to railroads, are enough to satisfy the intelligent reader that it ought not to have been made to do so. The situation of railroads is peculiar and there are peculiar reasons for regulating their business. Only confusion can result from attempting to deal in the same Act with railroad companies and those whose business is industrial and commercial. The Interstate Commerce Act and its supplements provide a scheme of regulation of transportation, and whatever changes should be made in such regulation may best be made by amending or supplementing these acts.

(3) The third proposition might be put in this form: The Act should be so changed as to deprive it of the meaning and effect declared in the Tobacco case.* In that case, and in two other cases decided about the same time, the judges of the Circuit Court of Appeals of the New York Circuit declared that every combination by which competition is ended or suspended between two or more persons or corporations engaged in interstate or foreign trade or commerce is illegal under this Act. It matters not whether it is a combination of two or more stage-drivers, butchers, bakers or candlestick-makers, or of two or more carpenters, bricklayers or other workmen, or of two or more corporations of the magnitude of the United States Steel Company. It matters not whether the combination is effected by forming a corporation or a partnership, or by one person, natural or artificial, buying an interest in the property and business of another or of others. It matters not that trade or commerce is increased and developed as the natural result of this combination. Every combination, they say, which involves any discontinuance of competition, however small, if only it relates to interstate or foreign business, is made illegal; and it follows that every person who has engaged in any such combination since July 2nd, 1890, is

* U. S. *v.* Am. Tobacco Co. *et al.*, U. S. C. C., N. Y., Nov., 1908.

guilty of misdemeanor. And this must be accepted as law, in the New York Circuit at least, unless and until it shall be declared erroneous by the Supreme Court.

It was found in the Tobacco case that the charges of improper conduct of the business were not well founded. The decision was based solely on the broad view of what the Act forbade. The theory of good and bad Trusts, under the Act, was annihilated. Every Trust, if by that is meant a combination which involves a discontinuance of competition by whatever method, is bad under the Act, if it relate to interstate or foreign trade or commerce. The Tobacco combination being illegal, so is the Steel combination, and so is the combination of two stage-drivers whose route crosses the Connecticut River, as it runs between Vermont and New Hampshire, and so is every partnership formed by the union of two competitors if engaged in interstate trade. This should not be so. Combinations, even large combinations, are necessary for the successful and economical conduct of our domestic business, and also in order that we may compete in the business of the world. And it is abhorrent to our sense of liberty that John Doe and Richard Roe, who have been doing each a little business in competition, should not be permitted to join hands and work together for larger results for themselves and for the community.

It is hardly conceivable that any intelligent citizens should refuse assent to the proposition that the sweeping condemnation of combinations declared to be found in the Sherman Act as it is should be done away with. We may differ as to what should be forbidden. But we must agree that, if the Act means what it is now declared to mean, its prohibitions go too far. Combination of capital and energies in and by itself should not be made illegal.

That the Act applies to combinations of labor, as well as of capital, is settled (Loewe *v.* Lawlor, 208 U. S., 274); and if combinations are illegal, as in effect held in the Tobacco case, no matter how fairly they deal, simply because competition is ended or suspended, the Act goes too far in the field of labor.

(4) The fourth proposition hits the most glaring fault of the Sherman Act, namely, that it was drawn in language of so uncertain meaning that no one could know what was forbidden, and that for this reason it in effect turned over to the Courts the work of legislation.

For two years or so, bills against Trusts were under consideration in Congress; and finally the Sherman Act, entirely redrawn by the judiciary committee of the Senate, was passed. In the House the consideration of the Act, as so redrawn, was quite hurried, and the spokesman of the Committee having it in charge stated that its meaning could not be known until the Courts should construe it. If the truth of this statement was open to any doubt at the time, it has been amply established since.

What was this but turning the work of Congress over to the Courts? Such a delegation of legislative functions would certainly have been rejected if the intention had been made clear. Possibly the Courts should have rejected it as it was, saying, in the language of the Supreme Court (5 Wheat. 95): "It is the Legislature and not the Court which is to define a crime." But they accepted the task and have now for eighteen years been trying to give a meaning to the Act, declaring what Congress meant when it used the words without definite intention, defining crimes which Congress denounced but did not define.

More than sixteen years after the passage of the Act, in September, 1906, Mr. Taft, speaking at Bath, Maine, said:

"It would seem as if Congress itself knew that the evil existed, but had a most indefinite idea of how it was to be described, and the matter was apparently *turned over to the Courts*, as the cases arose and decisions were invoked, *to work out the exact character of the offences denounced*, and the limitations which were to be introduced into the statute in order that the interpretation of it might accord with what was practicable and reasonable. . . . It was not to be expected that such a statute, *dependent as it was upon judicial interpretation to make it clear*, could operate effectively at once; and the slow course of judicial decision had to be awaited before the general purpose of the Act could be attained."

After all these years, the Courts have not yet "worked out" the character of the offences denounced. Congress and the Courts together have not yet made it clear what is prohibited, in accordance with the rule which in United States *v.* Reese (92 U. S., 214) is stated as follows:

"If the Legislature undertakes to define by statute a new offence and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

Delegation of legislative functions by using language "dependent upon judicial interpretation to make it clear" is a covert violation of the Constitution, not only because Congress may not delegate its powers, but also because *ex post facto* laws are forbidden. Laws which "declare an act criminal, and provide for its punishment, which, at the time of its commission, was not a crime," are *ex post facto* laws. The Courts, in construing an Act of Congress, impute to Congress an intention as of the time when it was passed. It is this that makes such construction necessarily retroactive. The Courts cannot limit the effect of their declarations to the future. Indeed, strictly speaking, they have to do only with the past. If their decisions really involve judicial legislation, such legislation, if it concerns crime, is necessarily of the character of *ex post facto* laws, making acts criminal which were not declared so at the time of their commission. And can there be any question that judicial legislation is involved, when an Act "dependent upon judicial interpretation to make it clear" is "turned over to the Courts . . . to work out the exact character of the offences denounced"?

The violation of the Constitution is called "covert," because the intention is not confessed—although what passed in the House before the passage of the Sherman Act reads very much like such a confession; and for this reason he who is charged with crime cannot avail himself of such violation in his defence. He must be punished, if his acts are now adjudged criminal, although such adjudication for the first time makes it clear that such acts are forbidden.

Consider again for a moment the Tobacco case. Probably no other decision—at any time or at any place—has revealed so many unsuspected and unsuspecting criminals. Thousands upon thousands of persons, who had no thought of violating the law, are here in effect declared guilty of misdemeanors committed at various times during the last eighteen years. Combinations believed to be lawful are now declared to have been unlawful; and it follows that all engaged in such combinations since July 2nd, 1890, are criminals, liable, except so far as protected by the Statute of Limitations, to fines or imprisonment or both. If all who are guilty under this construction of the Act were imprisoned the wheels of industry must stop. And they are guilty, not because what they have done they had before been told not to do,

but because the Courts, having now *worked out the exact character of the offences denounced,* have since declared what the Act prohibits, with like effect in law as if Congress had so declared in 1890.

All this is to be done away with if the suggestion of Mr. Taft is followed, that the amended Act shall speak in language of clear meaning, so that the business man can by reading it know what it forbids. He is bound to know the law; and, so far as this law is concerned, this is to be made possible. Surely justice demands this. The injustice of any other course has been sufficiently demonstrated. The meaning of this law, as it has been, all persons have been bound to know since 1890; and yet the judges of the Supreme Court have divided five to four upon it, and its meaning cannot to-day be told with certainty by any one, however expert, after all the efforts of the Courts to "work out the exact character of the offences denounced."

To insert the word "unreasonable" in connection with the words "restraint of trade or commerce" would, as Mr. Taft suggests, amount to a further delegation of legislative functions. It might enable the Court to work out the character of the offences more reasonably. But the nature of their task would not be changed; and it would still be true that business men could not tell what the Act must be understood to prohibit. Congress and not the Courts should now give to the Act whatever meaning is right, by the use of language not "dependent upon judicial interpretation to make it clear."

It is a corollary from this proposition that the amendment of the Act should not take the form of referring it to a commission to prescribe rules and regulations. Language may be uncertain; but still more uncertain is the course which a commission may follow, being vested with the power to make and change rules and regulations as to trade and commerce. Delegation of legislative functions to a commission is much more objectionable, upon grounds of constitutionality and of expediency, than delegation of such functions to the Courts by the use of language of uncertain meaning.

(5) The fifth proposition, that a definite understanding of the evil or evils to be cured should precede the enactment of remedies, would seem to need no argument in its support. Diagnosis should precede prescription. To prescribe without any idea what the

trouble is may sometimes be necessary to conceal the ignorance of the doctor or to satisfy the patient's demand that something be done. But it is not an approved method of curing disease.

It should be added that, as to any evil discovered, the question should be asked, Whether it is curable by legislation of any kind. There are evils in human society which cannot be legislated away, just as there are diseases of the body the only remedy for which is to stand back and give nature its fullest opportunity. It would seem almost useless to suggest this. Everybody knows it; but very few seem to act upon it in these days of competition in legislative cure-alls.

(6) The sixth proposition, that no remedy should be enacted which would do more harm than good, is too nearly axiomatic to call for argument or elaboration.

Whoever, accepting these six propositions, undertakes the task of drawing the amended Act, must ask this question: "In the field of industry and commerce, transportation excluded, what evil is there or what evils are there, suggested by the Act as it is, which should be remedied by legislation?"

After the evil, or evils, are found and the character of the needed legislative remedy is determined, it will be necessary, of course, to inquire whether Congress can provide such remedy, in view of the limitations upon its powers under the Constitution. But this question may best be put off until the end. The limitations upon the powers of Congress have nothing to do with the character of the evils or of the needed remedy. If a combination doing interstate business ought to be made illegal, so also should a like combination doing only intrastate business. The diagnosis must be the same, and likewise the remedy indicated. The difference affects only the question: By whom shall the remedy be given? So inquiry as to the character of the evils to be reached and the kind of remedy called for may best proceed in like manner as if a single Legislature had jurisdiction with respect to all matters of trade and commerce throughout the country.

Bearing upon this inquiry, Mr. Taft made another suggestion, —that what should be condemned was *intention to monopolize.* This was said tentatively, and not as a final conclusion. But its force and reasonableness will be more and more appreciated as the Act and its history are studied.

The sections of the Act which suggest evils are the first two. The first denounces as illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"; and the evil suggested is "Combination in restraint of trade or commerce." The second section declares guilty of a misdemeanor "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations"; and the evil suggested is "monopolizing trade or commerce." In the first opinion of the Supreme Court upon this Act (U. S. *v.* E. C. Knight Co., 156 U. S., 1) its purpose is stated as follows: "What the law struck at was combination, contracts and conspiracies to *monopolize* trade and commerce."

It is submitted that the first question to be put in the proposed inquiry is, whether "monopolizing," given a somewhat broad meaning, does not cover all of evil against which the Act should operate. That word is of indefinite meaning. It includes some things which certainly should not be condemned, some which have been held not to be within the Act as it is. It will need to be defined; the various things included must be classified, as denounced or not denounced; and the classification may perhaps be based to some extent on the methods by which, or the intention with which, power to monopolize shall have been acquired. But is it not true that whatever of evil the Act was intended to reach, and whatever it should be made to reach when amended, is included in what was meant to be expressed in this second section by the word "monopolize"? To put it in another way, If the evil of "monopolizing," as so meant, were done away with, would there be any occasion for continuing the Sherman Act on the statute-book? Or to put it more practically, perhaps, Should not the second section of the Act be taken as the basis of the amended Act, and the first section be thrown aside, except so far as it may aid in defining or limiting the evil of "monopolizing"?

There may be monopoly without combination; and there may be combination without monopoly. Monopoly may be effected by combination; and it may be the purpose of combination. Which is the evil to be denounced? If combination is to be

denounced only when its purpose is monopoly, then it would seem clear that the evil is monopoly only. Is not Mr. Taft's suggestion, that monopoly is the evil to be reached, in accord with the common thought, except as it has been confused by the discussion of the first section of the Act and the words "restraint of trade"? To the common mind, doubtless, the idea suggested by the two sections was the same. The word "combination" carried more meaning than the words "restraint of trade," and a meaning much the same as was carried by the word "monopolize." It was not commonly thought that the Act prevented two individuals, competitors in business, from becoming partners. The thought was that the Act hit the so-called monopolistic Trusts, the evils of which would generally have been described by the use of the word "monopoly." It is submitted that the common notion did not take in as a distinct evil "restraint of trade or commerce," but regarded the latter only as a method of "monopolizing."

In the Northern Securities case (193 U. S., 404) Mr. Justice Holmes said: "They [combinations or conspiracies in restraint of trade] were regarded as contrary to public policy *because they monopolized or attempted to monopolize* some portion of the trade or commerce of the realm." The idea of monopoly may be vague. It may be difficult to make it sufficiently definite for a criminal statute. It may be that monopoly cannot, without regard to the modes by which it is brought about, justly be made criminal. But does not the word "monopoly," as ordinarily understood, include all of evil which the common sense of the community seeks to reach by so-called anti-trust legislation? If so, the two sections must be thrown together, what is meant by monopoly being put in the foreground as the evil, and combination being dealt with only as a means or method by which such evil may be brought about. Then combination in and by itself will not be denounced. But denunciation will fall only on monopoly. Is not this the way to comply with Mr. Taft's suggestion that combination in and of itself should not be made illegal, and yet reach after the real evil of the Trusts, as commonly understood?

If the Act is to reach after "monopoly" only, there will still remain a difficult task, though one or two matters should be easily agreed upon.

It should be easily agreed that no such phrase as "to monopolize

*any part* of the trade or commerce" should appear in the Act as amended. In the Tobacco case, Judge Ward says: "As this section prohibits a monopoly of any part of such commerce, it cannot be literally construed. So applied, the Act would prohibit commerce altogether." In Whitwell *v.* Continental Tobacco Company (125 Fed. R., 452), Judge Sanborn says:

"Every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transaction. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and exclude others from, a part of that trade, and if he may not do this he may not compete with his rivals."

And in the Northern Securities case, Judge Holmes says:

"According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between the States, it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease."

Doubtless it will be agreed that the Act should clearly exempt monopolies which are created merely by the issue of patents, or by other legislative grants intended to give exclusive rights. In American Biscuit Manufacturing Co. *v.* Klotz (44 Fed. R., 721), it was said:

"In construing the Federal and State statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word 'monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under Government concessions."

There certainly should be no hesitation in refusing to accept any such proposal as to make the Act unobjectionable to laborers or farmers, or any other class, by excluding them from its operation. There is no legislative tendency more fraught with danger than the tendency to make the law satisfactory to the majority by exceptions which confine its burdens to the few. If monopoly of capital in any form should be condemned, then, upon principle, monopoly of labor should be condemned also. If monopoly of the products of the factory should be denounced, there is no good reason why monopoly of the products of the farm should not be denounced in like manner. Whether or not Congress has

power to do so, it certainly should not make discriminations such as the States are forbidden to make by the Constitution. (Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540.)

But a difficult question will be whether the law shall attempt to regulate the *acquisition* of the power to affect trade or commerce or the *use* of such power—to regulate the acquisition of property and the combination of capital or energies or the use of property acquired or of capital or energies combined. Mr. Taft has spoken on this question. In his Columbus speech (August 19th, 1907), he said:

"There must be something more than the mere union of capital and plants before the law is violated. There must be some *use* by the company of the comparatively great size of its capital and plant and extent of its output, either to coerce persons to buy of it, rather than of a competitor, or to coerce those who would compete with it to give up their business. There must, in other words, be an element of duress *in the conduct of its business* towards the customers in the trade and its competitors before a mere aggregation of plants becomes a monopoly."

Judge Holmes, in the Northern Securities case, says:

"I repeat that, in my opinion, there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on."

And again he says:

"The prohibition was suggested by the Trusts, the objection to which, as every one knows, *was not the union of former competitors,* but the sinister *power exercised* or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among partners, that was the evil feared."

And in this connection the language of Judge Jackson in *In re* Greene (52 F. R., 104) may well be read, especially the following:

"It is very certain that Congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportion as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offence was committed by such owner or owners."

It may be that the decision in the Northern Securities case is inconsistent with this opinion (although the decree did not affect the title to the stock which the company acquired), but the opinion is well worth consideration in determining what Congress shall undertake to prohibit for the future.

So, too, should the opinion of Judge Noyes in the Tobacco case, in regard to Section 2 of the Act, have careful consideration. He said:

"An aggregation of capital or property with power to control the market for a product might be brought about by lawful means without the element of combination; and might carry on its operations without the element of oppression. If the mere possession of power is the test of legality, then the inquiry in that case, as in any other case, would merely relate to the present status of the aggregation—what has it power to do?—without regard to its past history or its present methods. Thus a result might be declared unlawful which was obtained by lawful means; an aggregation of capital, criminal, which actually operated to the public benefit. The law that illegality depends wholly upon the power of performance may be settled, but it was not settled when the tendency towards unification of interests was so marked as at the present time. It may be that now in applying the second section of the statute performance, as well as power of performance, should be considered—that the elements of oppression and coercion should be shown to exist to establish an unlawful monopoly."

Since the Act as it is prohibits combination in restraint of trade, it had been held by the Supreme Court that a combination acquiring the power to restrain trade was within its condemnation, without regard to how it used its power. But Judge Noyes doubts whether the acquisition of power to monopolize is prohibited by Section 2. If now monopoly and not combination is the evil to be reached, the suggestions of Judge Noyes are quite pertinent in determining how the amended Act shall be drawn.

Should not the proposal to limit the right of acquisition or the right to combine capital or energies be put aside? Does not the evil to be remedied lie in the improper use of power rather than in the existence of power? The power which comes from acquisition is not evil; the power which comes from combination of capital or from combination of labor is not itself evil; shall the creation of such power be prohibited, because it may sometimes be abused?

Is there any good reason for making an exception with respect to acquisition by combination? The first section of the

Act has undoubtedly caused the prevalence of a notion that there is something inherently bad in combination, that to combine is necessarily wrong. But this is obviously unsound. Men almost every day combine for good; not so often for evil.

In the Tobacco case, Judge Noyes says:

> "Whether a transaction amounts to a sale or to a combination depends upon whether the vendor parts with all interest in the business sold, or merely changes the form of his investment. A *bona fide* sale of a plant for cash or its equivalent possesses none of the elements of combination. An exchange of one plant for an interest in united plants possesses all the elements of combination."

And this is reasonable as a matter of construction of the present Act. But it comes to this, that if A, owning a competing plant, sold it to the Tobacco Company, there was or was not a violation of Section 1, according as the consideration was stock, on the one hand, or cash or bonds on the other. Should there be such a distinction? The acquisition by one corporation of many plants creates power in a particular branch of industry. Does it make any difference as to such power, or as to the possible abuse of such power, whether the corporation is owned by those who formerly owned the plants or by others equally competent?

Beyond the conclusion that the use of power, rather than the acquisition of power, should be regulated, and that such regulation should seek to prevent monopolizing, and that some kind of duress, with intent to monopolize, is a necessary element of what should be denounced as criminal or illegal, Mr. Taft does not seem to have gone in any public utterances as to the substance of the Act as it should be, which have come to my attention. But, this conclusion being accepted, there will still remain questions enough, and questions difficult enough, to satisfy the keenest minds. Among them are the following:

How far can we go, and are we willing to go, in taking away rights which have hitherto been incidental to or involved in the ownership of property—or, in other words, in taking away the monopoly which is of the essence of private ownership? Can we make one rule as to labor, and another as to capital which is the product of labor? Can we make one rule as to the big traders and another as to the little ones? Are the little traders so given to fair dealing that we may with reason and justice regulate the competition of the big traders alone? If so, where shall the line

be drawn? How shall we define, so that all may understand, what acts are condemned as "monopolizing"?

And, perhaps, the most difficult questions spring from the fact that, while decisions under the Act as it is, especially that in the Tobacco case, declare that its underlying thought is that competition should be free and unrestrained, most of the later suggestions in regard to Trusts are proposals to restrict competition. Coercion by competition, or "the ferocious extreme of competition," is what now seems especially to call for legislative interference. How shall the Act be drawn so as to make competition free in the interest of consumers, and at the same time restrain competition in the interest of the weaker among competing producers and traders?

Evidently the work of amending the Sherman Act requires very careful consideration and the best of ability. There should be no dissent from the demand that that work be taken up and prosecuted upon the lines indicated by Mr. Taft in his speech before the Ohio Society.

THOMAS THACHER.